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No. 08-67

In the Supreme Court of the United States

F. SCOTT YEAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
RITA M. GLAVIN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's verdict that petitioner was not guilty on some counts bars the government from retrying petitioner on other counts on which the jury was unable to reach a verdict.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 521 F.3d 367. The opinion of the district court (Pet. App. 29a-66a) is reported at 446 F. Supp. 2d 719.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. A petition for rehearing was denied on April 14, 2008 (Pet. App. 68a-70a). The petition for a writ of certiorari was filed on July 14, 2008 (Monday), and was granted on November 14, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

In November 2004, petitioner was charged in a fifth superseding indictment with conspiracy to commit wire

fraud and securities fraud, in violation of 18 U.S.C. 371; securities fraud, in violation of 15 U.S.C. 78j(b) (1994), 15 U.S.C. 78ff (2000), and 17 C.F.R. 240.10b-5; four counts of wire fraud, in violation of 18 U.S.C. 1343 (2000); 20 counts of insider trading, in violation of 15 U.S.C. 78j(b) (1994), 15 U.S.C. 78ff (2000), and 17 C.F.R. 240.10b-5; and 99 counts of money laundering, in violation of 18 U.S.C. 1957 (2000). J.A. 6-26, 31-32, 37-56. After a trial in the United States District Court for the Southern District of Texas, the jury found petitioner not guilty on the conspiracy, securities fraud, and wire fraud charges. J.A. 161-162. The jury failed to reach a verdict on the other counts, and the district court declared a mistrial on those counts. Pet. App. 4a.

Thereafter, in November 2005, the government obtained an eighth superseding indictment charging petitioner with five counts of insider trading, in violation of 15 U.S.C. 78j(b) (1994), 15 U.S.C. 78ff (2000), and 17 C.F.R. 240.10b-5; and eight counts of money laundering, in violation of 18 U.S.C. 1957 (2000). J.A. 188-200. All of the charges in the eighth superseding indictment were counts from the fifth superseding indictment on which the jury had not reached a verdict. Pet. App. 31a-34a. Petitioner moved to dismiss all of the counts on the ground that the collateral estoppel component of the Double Jeopardy Clause barred further prosecution. *Id.* at 4a-5a & n.4. The district court denied the motion. *Id.* at 29a-66a. The court of appeals affirmed. *Id.* at 1a-28a.

1. Between 1998 and 2001, petitioner was the Senior Vice President of Strategic Development at Enron Broadband Services (EBS), a unit of Enron Corporation (Enron) engaged in the telecommunications business. J.A. 6-8; Tr. 1493-1494, 1496, 1638. During that time, EBS sought to develop an advanced fiber-optic commu-

nications network known as the Enron Intelligent Network (EIN), which was to include a network control software layer that would provide the "intelligence." The fifth superseding indictment alleged that petitioner and several co-defendants purposely sought to deceive the public and drive up the price of Enron stock by making false statements about EBS's progress on the EIN while at the same time enriching themselves by selling millions of dollars of Enron stock. J.A. 6-20.

a. The conspiracy count charged that petitioner—along with others, including co-defendants Joseph Hirko and Rex Shelby, who were also senior officers at EBS—purposely sought to deceive the public about the technological capabilities, value, revenue, and business performance of EBS. J.A. 6-24. The conspirators allegedly executed their scheme to defraud by "(i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS's poor business performance." J.A. 9. More specifically, petitioner, Hirko, Shelby, and others allegedly made or caused to be made false and misleading statements about EBS's development of the EIN and network control software at Enron's annual equity analyst conference in 2000 and in press releases before and after the conference. J.A. 10-13. At the same time, petitioner, Hirko, and Shelby allegedly sold large quantities of Enron stock, generating huge profits for themselves. J.A. 9, 20.

The securities fraud count charged that petitioner, together with Hirko and Shelby and others, committed

securities fraud by making false statements about EBS and the technological capabilities of the EIN and related software at the analyst conference. J.A. 6-20, 22, 25. The wire fraud counts charged that, after the conference, petitioner, along with Hirko and Shelby and others, caused Enron to issue four materially false and misleading press releases about EBS. J.A. 13, 22, 26. The insider trading counts charged that petitioner, while in possession of material, non-public information about the technological capabilities, value, revenue, and business performance of EBS and Enron, sold more than $54 million worth of Enron stock. J.A. 6-20, 31-32. The money laundering counts charged that petitioner knowingly engaged in monetary transactions in criminally derived property worth more than $10,000 with the proceeds of the alleged frauds and insider trading. J.A. 6-20, 37-56.[1]

b. The evidence at trial showed that petitioner attended meetings, exchanged e-mails, and participated in planning and preparing the presentation on EBS at the 2000 analyst conference. Tr. 1627-1629, 1735-1736, 1745, 1796. Petitioner helped craft an explanation of how the EIN would resolve problems with existing Internet and telecommunications technology. Tr. 1710-1711. In the months preceding the presentation, petitioner and other EBS employees had internal discussions about technological problems with the EIN and related products, as

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[1] The court of appeals focused its collateral estoppel analysis on the jury's acquittal on the securities fraud count. See Pet. App. 21a-22a & n.20. If that acquittal precludes retrial on the insider trading counts, it will also bar retrial on the money laundering counts because they are based on transactions with the proceeds of petitioner's alleged insider trading. See *id.* at 21a n.19. Accordingly, the discussion in this brief of the evidence at trial concentrates on the evidence relevant to the securities fraud and insider trading counts.

well as organizational problems at EBS. Tr. 1423, 1535, 1542-1548, 1761, 1766, 1772-1773, 1792-1793, 1798-1799, 1813-1816, 1835, 3569-3573, 3592-3598, 3634-3638, 3656-3678; see Pet. App. 53a-54a. Petitioner attended the EBS portion of the conference, but he did not make a presentation. Tr. 1795-1796.

The EBS presentation was made by co-defendants Hirko and Shelby, as well as Jeffrey Skilling, Enron's chief operating officer, and Kenneth Rice, one of EBS's chief executive officers. J.A. 8; Tr. 1430, 1626-1627, 1709-1710. Hirko, Shelby, Skilling, and Rice made numerous claims about the technological capabilities and performance of the EIN and related products. Tr. 1780-1805, 1810-1835, 1841-1850. Among other things, they claimed that EBS had developed advanced network control software with unique features that made the EIN superior to the networks of EBS's competitors. Tr. 1419-1430, 1791-1792, 1813-1817, 1830-1834, 2812-2819.[2]

The government introduced evidence at trial to prove that EBS had not yet fully developed the advanced network control software layer and that the EIN did not possess most of the advanced features and capabilities claimed during the presentation at the conference. Tr. 926-934, 1116-1117, 1152-1157, 1207-1209, 1220, 1565, 1596-1597, 1605-1606, 1711-1717, 1753-1766, 1835-1836, 2788-2789, 2791-2795, 2799-2801, 2812-2823, 3198-3217,

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[2] At trial, the government introduced two videotapes of the conference. Tr. 1419-1420, 1782-1783; Gov't Exhs. V-1-20-00 A and B. Rice testified on direct examination that a video made by Shelby about EBS's Broadband Operating System software that was included on the second videotape was shown at the conference. Tr. 1835-1841. On cross-examination, however, Rice conceded that he was mistaken and that the video was not shown to the equity analysts at the conference. Tr. 2512-2527, 2597-2609.

3569-3573, 3608-3611, 3732-3744, 3853-3865; see Pet. App. 51a-52a. In particular, Rice, who testified as a cooperating witness, stated that many of the representations about the EIN and the network control software layer were false. Tr. 1397-1398, 1416-1417, 1423-1430, 1582-1583, 1622-1623, 1670-1671, 1757-1759, 1923-1924, 2116-2118. Rice testified that EBS never fully developed the network control software. Tr. 1759, 1764, 1830.

Rice also testified that the purpose of the false statements at the conference was to increase the market valuation of Enron stock. Tr. 1399-1401, 1562-1570, 1582-1583. On the day of the conference, the share price of Enron stock rose from $54 to $67. Tr. 6389, 6395. The next day, the share price rose to $72. Tr. 6395. That same day, petitioner sold 100,000 shares of Enron stock. Tr. 6704-6705; Gov't Exh. 3155B. Over the next seven months, petitioner sold an additional 600,000 shares, generating total proceeds of more than $54 million and a total profit of more than $19 million. Gov't Exh. 3155B.

Petitioner testified on his own behalf, presenting several defenses. Tr. 9907-10,080, 10,121-10,249, 10,260-10,384, 10,396-10,453. He denied personally making any false statements about the development of the EIN at the conference or in the press releases. Tr. 9910-9914, 9918, 10,055-10,056. He also denied entering into an agreement with his co-defendants to defraud investors. Tr. 9920-9921. Petitioner denied having any role in the preparation of the press releases, and he claimed that his participation in planning the conference presentation was limited to the creation of two videos that were not shown. Tr. 9910-9911, 9913-9917, 9920, 9929-9944. In particular, petitioner denied having any role in preparing the presentation on the network control software

layer. Tr. 9941-9947, 9952-9953. In addition, petitioner claimed that he honestly believed in good faith that the problems with the EIN did not exist or were being remedied. Tr. 9920-9925, 9977-9980, 10,013-10,015, 10,021-10,022, 10,051-10,053. Petitioner denied that he used any insider information about problems at EBS when he sold Enron stock. Tr. 10,175-10,180; see Pet. App. 55a-56a.

c. On the securities fraud count, the district court instructed the jury that the government was required to prove beyond a reasonable doubt that, "in connection with the purchase or sale of Enron Stock, [petitioner] did any one or more of the following: (1) employed a device, scheme, or artifice to defraud as charged in the Indictment; or (2) made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading as charged in the Indictment; or (3) engaged in an act, practice, or course of conduct that operated, or would operate, as a fraud and deceit on any person as charged in the Indictment." J.A. 104-105. The court explained that "[a] 'device, scheme, or artifice to defraud[,]' as used in these instructions, * * * means the forming of some contrivance, plan, or design to trick or to deceive in order to obtain money or something of value." J.A. 106. The court emphasized that the jury could not find petitioner guilty unless the government proved that he "participated in the scheme or fraudulent conduct" or that he "caused [a false] statement to be made or [a material] fact to be omitted." J.A. 107; see J.A. 111 (instructing the jury that, "if you find that [petitioner] was not a knowing participant in the scheme[,] * * * you should acquit").

The court instructed the jury that the government was also required to prove beyond a reasonable doubt, as the second element, that petitioner "acted willfully, knowingly, and with the intent to defraud." J.A. 105. The court explained that "good faith on the part of a defendant is a complete defense to a charge of securities fraud, because such an honest or 'good faith' belief is inconsistent with a fraudulent intent." J.A. 109.

Finally, the court instructed the jury that the government was also required to prove beyond a reasonable doubt, as the third element, that petitioner "used, or caused to be used, any means or instrumentality of interstate commerce or of the mails." J.A. 105.[3]

The district court instructed the jury that the instructions on the securities fraud count applied to the insider trading counts as well. J.A. 125. In addition, on the insider trading counts, the court instructed the jury

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[3] On the wire fraud charges, the court instructed the jury that the government was required to prove four elements beyond a reasonable doubt: (1) that petitioner "knowingly devised or intended to devise a scheme to defraud, as described in the indictment"; (2) that he "acted with a specific intent to defraud"; (3) that he "used or caused another person to use interstate wire communications facilities for the purpose of carrying out the scheme"; and (4) that "the scheme to defraud employed false material representations." J.A. 116. On the conspiracy charge, the court instructed the jury that the government was required to prove beyond a reasonable doubt that (1) "[petitioner] and at least one other person made an agreement to commit the crime of wire fraud or securities fraud"; (2) "[petitioner] knew the unlawful purpose of the agreement and joined in it willfully"; and (3) "one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in Count One of the Indictment, in order to accomplish some object or purpose of the conspiracy." J.A. 90. The court stressed that, if the jury found that petitioner "was not a member of the conspiracy to commit securities fraud or wire fraud as charged in the indictment, then [it] must find [petitioner] not guilty." J.A. 92.

that "[t]he 'device, scheme, or artifice' that the government alleges [petitioner] employed in this case is known as insider trading." *Ibid.* The court explained that "[a]n insider is one who comes into possession of material, confidential, non-public information about a stock by virtue of a business relationship which involves trust and confidence" and that "the law forbids him from using that inside information in buying or selling the securities in question." *Ibid.*

d. The jury acquitted petitioner on the conspiracy, securities fraud, and wire fraud counts. J.A. 161-162. The jury was unable to reach a verdict on the insider trading and money laundering counts. J.A. 162-187. The district court therefore declared a mistrial on those counts. Pet. App. 4a.

2. Petitioner was subsequently charged in the eighth superseding indictment with some, but not all, of the counts from the fifth superseding indictment on which the jury had deadlocked. Specifically, the eighth superseding indictment charged petitioner with five counts of insider trading and eight counts of money laundering. J.A. 188-200. Like the insider trading counts in the earlier indictment, J.A. 31, the insider trading counts in the eighth superseding indictment allege that petitioner sold Enron stock "while in possession of material, non-public information regarding the technological capabilities, value, revenue and business performance" of EBS and Enron. J.A. 195. The money laundering counts in the eighth superseding indictments are based on monetary transfers involving funds derived from the sales of Enron stock charged as insider trading. J.A. 196-197; see note 1, *supra*. Unlike the earlier indictment, J.A. 9-13, the eighth superseding indictment does not allege that petitioner participated in a scheme to defraud, and

the government would not have to establish such participation in order to secure a conviction.

3. Petitioner moved to dismiss all of the counts in the eighth superseding indictment (as well as the mistried counts in the fifth superseding indictment). Pet. App. 4a-5a & n.4. He contended that the collateral estoppel component of the Double Jeopardy Clause bars prosecution on the insider trading counts because the government could obtain a conviction on those counts only by proving that he used material, non-public information in his sales of Enron stock, and the jury at the first trial necessarily found that he did not possess such insider information when it acquitted him on the conspiracy, securities fraud, and wire fraud counts. *Id.* at 39a-40a, 49a-50a. Petitioner further argued that, if the insider trading counts are barred, the money laundering counts also must be dismissed, because they are predicated on the alleged insider trading violations. *Id.* at 40a.

The district court denied petitioner's motion. Pet. App. 29a-66a. The court found that the acquittals at the initial trial did not collaterally estop the government from retrying petitioner on the counts on which the jury hung. "In light of (1) the massive amount of circumstantial evidence presented by the government, and (2) the direct testimony of [petitioner] that he did not participate in the crafting of the message at the 2000 Analyst Conference, drafting of press releases, or agreement to defraud investors," the court concluded that "the jury[,] by choosing [petitioner's] version of events, necessarily determined that [he] did not knowingly and willfully participate in the scheme to defraud described in the

conspiracy, securities fraud, and wire fraud counts." *Id.* at 57a-58a.[4]

That determination, the court observed, did not "negate the government's evidence and contention that [petitioner] possessed and used material nonpublic information at the time he made trades of Enron stock." Pet. App. 59a. Instead, it "only establish[ed] that [petitioner] did not participate in the overall scheme to defraud," *i.e.*, the false and misleading statements allegedly made at the 2000 analyst conference and in the press releases. *Ibid.* Because the government was not required to prove petitioner's participation in the scheme to defraud in order to convict him on the insider trading counts, the court ruled that the acquittals did not collaterally estop the government from retrying petitioner on the insider trading and money laundering counts charged in the eighth superseding indictment. *Id.* at 58a-59a, 62a.

4. The court of appeals affirmed the district court's judgment. Pet. App. 1a-28a. Without addressing the government's argument that *Richardson* v. *United States*, 468 U.S. 317 (1984), permitted the retrial of the mistried counts despite the acquittals on the other counts, the court of appeals held that petitioner had not

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[4] The district court concluded that the jury's acquittals were not based on petitioner's "good faith" defense, which "operate[d] as a valid and complete defense to both securities fraud and insider trading" under the court's jury instructions. Pet. App. 58a. The court observed that, "[i]f the jury necessarily acquitted [petitioner] [on the securities fraud count] based on the 'good faith' defense, they would have had to acquit [petitioner] of insider trading as well." *Id.* at 59a. "Because the jury did not acquit [petitioner] of both securities fraud and insider trading, but instead chose only to acquit [petitioner] of conspiracy, securities fraud, and wire fraud," the court found that "the most realistic, rational and practical analysis of the verdicts is that the jury did not acquit [petitioner] based on the defense of 'good faith.'" *Ibid.*

made the showing necessary to invoke collateral estoppel. Pet. App. 18a-28a. In analyzing petitioner's collateral estoppel claim, the court focused on the jury's acquittal on the securities fraud count. See *id.* at 18a-22a & n.20. The court concluded that, even though the acquittal, when viewed in isolation, appeared to reflect a jury finding that petitioner did not possess insider information, collateral estoppel analysis also requires consideration of the hung counts. *Id.* at 18a-23a. Taking into account those counts, the court held that petitioner had not met his burden of showing that the jury necessarily decided that he did not have insider information. *Id.* at 23a-28a.

Based on its review of the record, the court of appeals first concluded that the jury must have decided, in acquitting petitioner on the securities fraud count, that the government did not prove either the first element of the offense—*i.e.*, that petitioner participated in making material misrepresentations or omissions—or the second element—*i.e.*, that petitioner acted willfully, knowingly, and with the intent to defraud. Pet. App. 19a. The court next determined that the jury could have acquitted petitioner based on the first element only by finding that no misrepresentations or omissions were made at the 2000 analyst conference, and not by finding that petitioner did not participate in the scheme to defraud. *Id.* at 19a-20a. In reaching that determination, the court reasoned that petitioner had not disputed the government's claims at trial that he shaped the message of the EBS presentation at the conference. *Id.* at 20a.

The court further determined that the jury could have acquitted petitioner based on the second element only by finding, consistent with petitioner's "good faith" defense, that he did not knowingly make material mis-

representations or omissions, and not by finding that he acted negligently. Pet. App. 20a. In reaching that determination, the court again relied on its belief that petitioner had not disputed that he helped plan the conference message. *Ibid.*

The court then reasoned that, whether the jury acquitted (1) based on a finding that no material misrepresentations or omissions were made at the conference or (2) based on a finding that petitioner acted in good faith, "the jury must have found * * * that [petitioner] himself did not have any insider information." Pet. App. 21a. The court therefore concluded that, if the acquittals are viewed in isolation, the jury "seemingly made a finding that precludes the Government from now prosecuting [petitioner] on insider trading and money laundering." *Ibid.*[5]

The court ruled, however, that its precedent required it to consider the hung counts, along with the acquitted counts, in ascertaining what the jury actually determined. Pet. App. 22a-23a (citing *United States* v. *Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980)). Conducting that analysis, the court observed that, "if [petitioner] is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering." *Id.* at 23a-24a. The fact that the jury instead hung, the court concluded,

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[5] Because the court agreed with petitioner that the jury's acquittal on the securities fraud count, viewed in isolation, was based on a finding that he did not possess insider information, the court found it "unnecessary * * * to determine whether the jury made the same conclusion when it acquitted [petitioner]" on the conspiracy and wire fraud counts. Pet. App. 22a n.20.

presented a "potential inconsistency." *Id.* at 22a. The court considered various possible explanations for the "discrepancy," including that "the jury was irrational and came to two inconsistent conclusions" and that "the jury decided that [petitioner] had insider information when considering both" the acquitted counts and the hung counts, "but, for some unknown reason, it nonetheless acquitted [petitioner] on some of them." *Id.* at 24a. Because it was "impossible" to determine why the jury reached the mixed verdict, the court concluded that petitioner had not carried his burden of establishing that the jury necessarily decided that he did not possess insider information. *Id.* at 23a-24a. The court therefore held that collateral estoppel does not bar a retrial on the hung counts. *Id.* at 24a.

In concluding, the court explained that it had not accepted the government's argument, based on *United States* v. *Powell*, 469 U.S. 57 (1984), that collateral estoppel never bars a retrial when a jury hangs on some counts but acquits on others. Pet. App. 25a. The court expressed agreement with those courts of appeals that have rejected that argument. *Id.* at 26a-27a. The court stated, however, that it parted ways with those circuits to the extent that "they ignored the mistried counts after they determined that *Powell* does not apply." *Id.* at 27a. Accordingly, the court affirmed the district court's denial of petitioner's motion to dismiss. *Id.* at 28a.

SUMMARY OF ARGUMENT

The jury's acquittals at petitioner's first trial do not collaterally estop the government from retrying him on other counts on which the same jury hung.

A. The Double Jeopardy Clause provides that no person shall be "subject for the same offence to be twice

put in jeopardy of life of limb." U.S. Const. Amend. V. Although the text and common-law origins of the Clause suggest that it prohibits successive prosecutions only for the same offense, this Court has held that it also embodies collateral estoppel, which prohibits a successive prosecution on a related offense if an acquittal in the initial prosecution necessarily decided a factual issue in the defendant's favor that the government must prove to convict him on the related offense. *Ashe* v. *Swenson*, 397 U.S. 436, 443-445 (1970). At the same time, this Court has consistently recognized that the Double Jeopardy Clause does not guarantee a defendant that a prosecution will be completed in a single trial. Instead, the Clause affords the government "one full and fair opportunity" to obtain a conviction of those who have violated the law. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978).

B. The jury's failure to agree on a verdict has long been recognized as the classic example of when the Double Jeopardy Clause permits retrial. See *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Because "retrial following a 'hung jury' does not violate the Double Jeopardy Clause," *Richardson* v. *United States*, 468 U.S. 317, 324 (1984), the collateral estoppel component of the Clause does not bar retrial on hung counts when the jury acquits on other counts. Retrial on the hung counts is an integral part of the government's "one complete opportunity to convict," *ibid.* (citation omitted); that is, it represents a continuation of the initial prosecution that produced both the hung counts and the acquittals. It is not a successive prosecution that raises the concerns underlying the Double Jeopardy Clause and its collateral estoppel component.

This Court has never applied collateral estoppel across counts to bar retrial on charges for which the defendant remains in jeopardy. All of the Court's cases applying the doctrine have involved seriatim prosecutions. "[W]here the State has made no effort to prosecute the charges seriatim," this Court has rejected application of collateral estoppel, reasoning that "continuing prosecution on the remaining charges" does not implicate "the principles of finality and prevention of prosecutorial overreaching" that animate the double jeopardy protection. *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9, 501 (1984).

C. A jury's acquittal on one count cannot estop the government from retrying the defendant on another count on which the same jury hung for an independent reason. That kind of mixed verdict has only two possible explanations, and neither possibility supports applying collateral estoppel. The acquittal may rest on a jury finding that the government failed to prove a fact that, although essential for conviction on the count on which the jury acquitted, was not essential for conviction on the count on which the jury deadlocked. Collateral estoppel does not apply in that situation, because an acquittal on one charge collaterally estops the government from prosecuting another charge only if the jury, in finding the defendant not guilty, necessarily decided some fact that the government must prove beyond a reasonable doubt in order to convict on the second charge. See *Ashe*, 397 U.S. at 443-445. Alternatively, the acquittal may rest on a jury finding that the government failed to prove a fact that was essential for conviction on both the acquitted count and the hung count. Collateral estoppel does not apply in that circumstance, because the jury's failure to acquit on the hung count is inconsistent with

the jury's acquittal on the other count. That inconsistency vitiates "the assumption that the jury acted rationally," which is a necessary predicate for applying collateral estoppel. *United States* v. *Powell*, 469 U.S. 57, 68 (1984).

Petitioner argues (Br. 26) that a mixed verdict of acquittals and hung counts is not facially inconsistent like the mixed verdict of acquittals and convictions in *Powell*. But if a single finding of fact would dictate acquittal on two counts, and the jury acquits on one and hangs on the other, the jury has not acted consistently or rationally. Collateral estoppel cannot be applied in that situation without giving effect to an irrational decision. Petitioner also argues (Br. 15, 34-44) that, because hung counts are not formal jury decisions, they cannot be considered at all in the collateral estoppel analysis. But that contention cannot be squared with this Court's command in *Ashe* that the analysis consider "all the circumstances" of the prior proceedings. 397 U.S. at 444 (citation omitted).

D. Petitioner argues (Br. 16-23) that he should not be subjected to the costs and anxiety of a second trial. But a defendant must endure those costs and anxiety whenever the government retries charges following a hung jury. Acquittals on other counts should not deprive the government of its one complete opportunity to obtain a conviction on the hung counts. Nor will allowing retrial on the hung counts, where the jury could not agree, undermine "the traditional deference accorded jury acquittals." *Id.* at 16; see *id.* at 23-27. The acquittal still bars reprosecution on the same offense, and its collateral estoppel effect can be asserted in subsequent prosecutions. Nor will allowing retrial on hung counts in the circumstances here encourage overcharging. Cf.

id. at 27-34. Prosecutors already have substantial incentives not to overcharge in order to avoid jury confusion and the potential for mistrial on all counts. And, if such policy concerns have any weight in answering the constitutional question, the controlling policy should be the public's interest in having one full and fair opportunity for a conviction on the hung counts.

E. Even if acquittals may sometimes preclude retrial on counts on which the same jury hangs, this Court should affirm the judgment of the court of appeals. As the district court found, the jury's acquittals on the conspiracy, securities fraud, and wire fraud charges may have rested on a finding that petitioner did not participate in the fraudulent statements or omissions made at the 2000 analyst conference and in the press releases following the conference. The government need not prove that petitioner participated in those frauds to convict him on the insider trading and money laundering charges. Accordingly, petitioner cannot carry his burden of showing that the jury, in acquitting him on the conspiracy and fraud charges, necessarily found a fact in his favor that the government must prove to convict him on the charges on which it seeks to retry him.

ARGUMENT

THE JURY'S ACQUITTALS AT PETITIONER'S FIRST TRIAL DO NOT PRECLUDE HIS RETRIAL ON THE COUNTS ON WHICH THE SAME JURY HUNG

The collateral estoppel component of the Double Jeopardy Clause cannot preclude retrials where the jury rendered a mixed verdict of acquittals and hung counts. That is so for two basic reasons. First, permitting preclusion would conflict with the established rule that when a jury hangs, the government may retry the case

in order to have a complete opportunity for a verdict on a charged offense. Second, a mixed outcome presupposes either that the jury's two results (acquittals and hung counts) are consistent—in which case the factual predicate for collateral estoppel is missing—or that the two results are inconsistent and irrational—in which case the logical predicate for collateral estoppel is missing. In any event, even if acquittals could sometimes preclude retrials on counts on which the same jury hung, petitioner has not established that preclusion is warranted here. He has not shown that the jury, in acquitting him on the conspiracy and fraud charges, necessarily found a fact in his favor that the government must prove in order to convict him on the insider trading and money laundering counts on which it seeks to retry him.

A. The Double Jeopardy Clause Affords The Government One Complete Opportunity To Convict Those Who Have Violated The Law

1. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Clause protects a defendant against "a second prosecution for the same offense" after acquittal or conviction and against multiple punishments for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969).

The Double Jeopardy Clause "affords the defendant who obtains a judgment of acquittal * * * absolute immunity from further prosecution for the same offense." *Lockhart* v. *Nelson*, 488 U.S. 33, 39 (1988); see *United States* v. *Ball*, 163 U.S. 662, 671 (1896); see also *United States* v. *Scott*, 437 U.S. 82, 91 (1978) (government cannot appeal an acquittal); *United States* v. *Mar-*

tin Linen Supply Co., 430 U.S. 564, 571 (1977) (same). An acquittal is accorded "special weight" for two reasons. *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980). "The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962) (per curiam)). In addition, permitting retrials after acquittals would present an unacceptable "risk that the Government, with its vastly superior resources, might wear down the defendant," *Scott*, 437 U.S. at 91, through "repeated attempts to convict," *Green* v. *United States*, 355 U.S. 184, 187 (1957).

2. In *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970), this Court held that the principle of collateral estoppel is also "embodied" in the Double Jeopardy Clause. As the Court explained, collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. The burden is "on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling* v. *United States*, 493 U.S. 342, 350 (1990); see *Schiro* v. *Farley*, 510 U.S. 222, 232-233 (1994).

Ashe's holding that the Double Jeopardy Clause embodies collateral estoppel was an innovation. The Clause by its terms applies only to multiple jeopardy "for the same offence." U.S. Const. Amend. V. Collateral estoppel, by definition, applies only when two offenses are different, but share a common issue. See *United States* v. *Dixon*, 509 U.S. 688, 704-705 (1993). In addition, as a

matter of history, the Double Jeopardy Clause was intended to embody the common-law pleas of autrefois acquit and autrefois convict, which likewise were offense-specific. See *Scott*, 437 U.S. at 87; *United States* v. *Wilson*, 420 U.S. 332, 340-342 (1975); 4 William Blackstone, *Commentaries* *330; Edward Coke, *The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* *213. As the Court acknowledged in *Ashe*, the Court had never before held that collateral estoppel is constitutionally mandated in criminal cases. 397 U.S. at 445 n.10. Indeed, collateral estoppel first developed in civil litigation, and the Court did not apply the doctrine to bar a federal criminal prosecution until 1916, in *United States* v. *Oppenheimer*, 242 U.S. 85.[6] See *Ashe*, 397 U.S. at 443.

Nonetheless, in *Ashe*, the Court concluded that collateral estoppel is a necessary component of the Double Jeopardy Clause's protection against successive prosecutions. The Court explained that, "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 445-446 (citations omitted). The Court noted that the increasing

[6] In fact, *Oppenheimer* actually involved claim preclusion, rather than issue preclusion, which is the modern term for collateral estoppel. See *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 & n.5 (2008). In *Oppenheimer*, an indictment was dismissed as barred by the statute of limitations; the government later reindicted the defendant after a decision of this Court revealed that the limitations ruling was wrong. 242 U.S. at 86. The Court applied the doctrine of res judicata to affirm the dismissal of the second indictment. *Id.* at 87. The Court later applied common-law issue preclusion, or collateral estoppel, to bar a substantive charge after acquittal on a conspiracy charge in *Sealfon* v. *United States*, 332 U.S. 575 (1948).

number of overlapping statutory offenses has created potential for unfair, seriatim prosecutions for related offenses. *Id.* at 445 n.10. The Court viewed collateral estoppel as a necessary safeguard against such successive prosecutions. *Ibid.* Otherwise, the Court stated, the government could use a trial for one offense "as no more than a dry run for [a] second prosecution" for another crime that turns on the same ultimate facts. *Id.* at 447.

3. Despite rules against successive prosecutions, this Court has consistently recognized that the Double Jeopardy Clause "does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982). "There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of the law to protect society from those guilty of crimes would be frustrated by denying courts power to put the defendant to trial again." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949).

Accordingly, this Court has repeatedly held that the Double Jeopardy Clause does not stand in the way of "affording the prosecutor one full and fair opportunity" to obtain a conviction of those who have violated the law. *Washington*, 434 U.S. at 505. The Court has therefore recognized numerous situations in which retrial is appropriately viewed as a continuation of the initial prosecution rather than a prohibited successive prosecution. Those situations include retrial after a mistrial justified by "manifest necessity," such as the jury's inability to reach a verdict, or trial error that cannot otherwise be corrected, *United States* v. *Perez*, 22 U.S. (9 Wheat.)

579, 580 (1824); *Illinois* v. *Somerville*, 410 U.S. 458, 464 (1973); retrial after a mistrial granted on the defendant's motion (unless the government intended to provoke the mistrial request), *Kennedy*, 456 U.S. at 678-679; and retrial after the defendant has obtained reversal of his conviction because of trial error, *Ball*, 163 U.S. at 671-672, because his guilty plea was involuntary, *United States* v. *Tateo*, 377 U.S. 463, 463-464 (1964), or because the conviction was against the weight of the evidence, *Tibbs* v. *Florida*, 457 U.S. 31, 47 (1982).

In those situations, the "criminal proceedings against [the] accused have not run their full course." *Price* v. *Georgia*, 398 U.S. 323, 326 (1970). He remains in "continuing jeopardy" from the initial prosecution and is subject to retrial without offending the Double Jeopardy Clause. *Ibid.*; see *Richardson* v. *United States*, 468 U.S. 317, 325-326 (1984); *Justices of the Boston Mun. Court* v. *Lydon*, 466 U.S. 294, 308-309 (1984).

B. Because A Defendant Remains In Continuing Jeopardy On Hung Counts, The Collateral Estoppel Component Of The Double Jeopardy Clause Does Not Bar Retrial On Those Counts When The Jury Acquits On Other Counts

This Court has long held that the failure of the jury to agree on a verdict is "[t]he classic example" of a situation in which the Double Jeopardy Clause permits a retrial. *Downum* v. *United States*, 372 U.S. 734, 736 (1963); see, *e.g.*, *United States* v. *Sanford*, 429 U.S. 14, 16 (1976) (per curiam); *Keerl* v. *Montana*, 213 U.S. 135, 137-138 (1909); *Dreyer* v. *Illinois*, 187 U.S. 71, 86 (1902); *Logan* v. *United States*, 144 U.S. 263, 297-298 (1892); *Perez*, *supra*. Because "retrial following a 'hung jury' does not violate the Double Jeopardy Clause," *Richardson*, 468 U.S. at 324, the collateral estoppel component

of the Clause does not bar retrial on a hung count when the jury acquits on another count.

1. In *Richardson*, the jury acquitted the defendant on one count but was unable to reach a verdict on two other counts. 468 U.S. at 318-319. After the district court declared a mistrial on those counts, the defendant moved to bar a retrial, arguing that a second trial would violate the Double Jeopardy Clause because the government had not presented sufficient evidence at the first trial to convict on the hung counts. *Id.* at 318. This Court rejected the defendant's double jeopardy claim. *Id.* at 322-326. The Court explained that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy," *id.* at 325, but "a mistrial following a hung jury is not an event that terminates the original jeopardy," *id.* at 326. Noting "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws," *id.* at 324 (citation omitted), the Court explained that "[t]he Government, like the defendant, is entitled to resolution of the case by verdict from the jury," *id.* at 326.

Richardson makes clear that retrial on hung counts under the circumstances here does not implicate the concern about successive prosecutions that underlies the collateral estoppel component of the Double Jeopardy Clause. As *Richardson* establishes, when the government brings a group of related counts together in one prosecution, and the jury hangs on some counts but acquits on others, the defendant's "original jeopardy" on the hung counts does not terminate. 468 U.S. at 326. Retrial on the hung counts is a continuation of the initial proceeding that produced both the hung counts and the acquittals. It is an integral part of the government's

"one complete opportunity to convict," not a successive prosecution designed to harass or to oppress the defendant. *Id.* at 324 (citation omitted).

This Court has never applied collateral estoppel across counts to bar retrial on charges for which the defendant remains in jeopardy. Instead, all of the Court's cases applying collateral estoppel have involved seriatim prosecutions. See *Turner* v. *Arkansas*, 407 U.S. 366 (1972) (per curiam); *Harris* v. *Washington*, 404 U.S. 55 (1971) (per curiam); *Simpson* v. *Florida*, 403 U.S. 384 (1971) (per curiam); *Ashe*, *supra*; *Sealfon* v. *United States*, 332 U.S. 575 (1948); *United States* v. *Adams*, 281 U.S. 202 (1930); *Oppenheimer*, *supra*. *Ashe* is a typical example. In *Ashe*, a group of masked men robbed six men playing poker in a home. 397 U.S. at 437. The defendant was initially prosecuted for robbing one of the poker players, but the jury acquitted him. The State then brought to trial a second prosecution against the defendant for robbing a different poker player. *Id.* at 438-440. Reversing the defendant's conviction, this Court held that collateral estoppel barred the second prosecution because the jury's acquittal in the first prosecution must have rested on a finding that the defendant was not one of the robbers. *Id.* at 445-446. *Ashe* thus involved a deliberate strategy by the State to prosecute sequentially multiple offenses arising out of a single criminal episode in order to evaluate and strengthen its evidence, spread its risk among several juries, or wear down the defendant. The Court concluded that such successive prosecutions involve the kind of government oppression that the Double Jeopardy Clause forbids. *Id.* at 447.

In contrast, "where the State has made no effort to prosecute the charges seriatim," this Court has rejected

application of collateral estoppel. *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984). The Court has explained that, in that circumstance, "the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Ibid.* In *Johnson*, the Court rejected the defendant's claim that his guilty pleas on two of the charges brought against him collaterally estopped the State from trying him on two other charges brought in the same prosecution. *Ibid.* The Court noted that "continuing prosecution on the remaining charges" did not implicate "the principles of finality and prevention of prosecutorial overreaching" underlying the double jeopardy prohibition. *Id.* at 501. "On the other hand," the Court stressed, "ending [the] prosecution" in midstream "would deny the State its right to one full and fair opportunity to convict" the defendant on the remaining charges. *Id.* at 502.

The same considerations counsel against applying collateral estoppel to bar retrial on hung counts based on the jury's acquittal on other counts brought in the same prosecution. Retrial on the hung counts does not intrude on finality, because it merely completes the original prosecution. Retrial on the hung counts also presents "none of the governmental overreaching that double jeopardy is supposed to prevent." *Johnson*, 467 U.S. at 502. The government attempted to bring all the charges in a single proceeding, but it was forced to retry some of the charges because the jury hung. The government is therefore not trying to "wear down the defendant," *Scott*, 437 U.S. at 91, through "repeated attempts to convict," *Green*, 355 U.S. at 187.

Precluding retrial on the hung counts would deprive the government of "its right to one full and fair opportunity to convict" the defendant on those counts. *Johnson*,

467 U.S. at 502. Respect for that governmental interest is the principal reason for the longstanding rule permitting retrial on charges on which a jury deadlocks. See *Washington*, 434 U.S. at 509. Applying collateral estoppel across counts in mixed verdict cases to bar retrial on hung counts would therefore undermine "the public's interest in fair trials designed to end in just judgments." *Kennedy*, 456 U.S. at 672 (quoting *Wade*, 336 U.S. at 689). And it would inappropriately allow the defendant to transform his partial victory in the jury room into a complete victory that the jury refused to give him.

The public interest in allowing retrial on hung counts is particularly strong in the mixed verdict context because the government has no ability to challenge the acquittals. See *Green*, 355 U.S. at 188 ("[O]ne of the elemental principles of our criminal law" is "that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."). In the civil context, collateral estoppel does not apply at all when the party that would be precluded had no legal right to obtain review of the judgment. Restatement (Second) of Judgments § 28(1) (1982). Although the government's inability to appeal from an acquittal does not prevent the application of collateral estoppel in the criminal context, it counsels strongly against allowing a jury's acquittal to bar retrial on a hung count when the jury itself refused to acquit on that very count.

2. Petitioner contends that relying on *Richardson* to permit retrial on hung counts in a mixed verdict would "conflate[] traditional double jeopardy and the related doctrine of collateral estoppel" and "overrule *Ashe*." Br. 43-44. That contention is incorrect.

Collateral estoppel will continue to have effect independent of traditional double jeopardy principles even

if the Court holds that *Richardson*'s continuing jeopardy principle precludes applying collateral estoppel here. Whenever the government actually pursues seriatim prosecutions, the *Richardson* principle will not prevent collateral estoppel from barring a successive prosecution that requires proof of a fact necessarily decided against the government in a prior prosecution. Collateral estoppel will preclude the successive prosecution even if it is for a different offense and is therefore not barred under traditional double jeopardy analysis. See, *e.g.*, *Sealfon*, *supra*.

Petitioner's attempt to wholly divorce collateral estoppel from the surrounding and independently valid double jeopardy principles—such as the longstanding rule permitting retrials of hung counts—cannot be squared with this Court's holding in *Ashe* that collateral estoppel is not a freestanding constitutional guarantee but is "embodied" in the Double Jeopardy Clause itself. *Ashe*, 397 U.S. at 445. *Ashe*'s holding that the Double Jeopardy Clause embodies collateral estoppel is settled law, even if it is difficult to reconcile *Ashe* with the text and common-law origins of the Clause. See pp. 20-21, *supra*. But it is one thing to leave *Ashe* intact and quite another to allow collateral estoppel to overcome other established double jeopardy doctrines that afford the government a complete opportunity to convict those who have violated the laws. *Ashe* should therefore not be permitted to displace the *Richardson* rule. Indeed, under *Richardson*, the rule permitting retrials of hung counts prevails even where the jury *should* have acquitted because of insufficient evidence. A defendant should not be better off when the government introduces sufficient evidence to convict on all counts, but the jury for

reasons of its own acquits on some but cannot agree on others.

C. The Rationale Behind Collateral Estoppel Does Not Apply When A Jury Acquits On Some Counts And Hangs On Other Counts At The Same Trial

1. Even if collateral estoppel could apply in the absence of a successive prosecution, a jury's acquittal on one count would not estop the government from retrying the defendant on another count on which the same jury hung. That kind of mixed verdict has only two explanations, neither of which permits the application of collateral estoppel.

The acquittal may rest on a jury finding that the government failed to prove a fact that, although essential for conviction on the count on which the jury acquitted, was not essential for conviction on the count on which the jury deadlocked. For example, in this case, the district court concluded that "the most realistic, rational and practical analysis of the verdicts" is that the acquittals on the conspiracy and fraud counts rested on the jury's conclusion that the government did not prove that petitioner participated in the fraudulent statements made at the analyst conference and in the press releases—a fact that the government need not prove to convict him on the insider trading and money laundering counts on which the jury hung. Pet. App. 59a. Collateral estoppel is not applicable in that situation, because an acquittal on one charge collaterally estops the government from prosecuting another charge only if the jury, in finding the defendant not guilty, necessarily decided some fact that the government must prove beyond a reasonable doubt in order to convict on the sec-

ond charge. See *Dowling*, 493 U.S. at 347-348, 350-352; *Ashe*, 397 U.S. at 443-445.

Alternatively, the acquittal may rest on a jury finding that the government failed to prove a fact that was essential for conviction not only on the acquitted count but also on the hung count. For example, in this case, the court of appeals concluded that the acquittal on the securities fraud count "seemingly" rested on the jury's conclusion that the government did not prove that petitioner possessed insider information—a fact that the government also had to prove to convict him on the hung counts. Pet. App. 21a. Collateral estoppel would not apply in that circumstance, however, because the jury's failure to acquit on the hung counts would be inconsistent with the jury's acquittal on the other count. A rational jury that found the common fact against the government would have to acquit on both sets of counts. That inconsistency vitiates "the assumption that the jury acted rationally," which is a necessary predicate for application of collateral estoppel. *United States* v. *Powell*, 469 U.S. 57, 68 (1984).

2. The conclusion that a jury's acquittal on one count cannot collaterally estop the government from retrying a count on which the same jury deadlocks follows directly from *Powell*. In *Powell*, the jury acquitted the defendant on two drug charges but found her guilty on charges that she used a telephone to commit or to facilitate those drug offenses. 469 U.S. at 59-60. The defendant argued that "collateral estoppel should apply * * * to preclude acceptance of a guilty verdict on a telephone facilitation count where the jury acquits the defendant of the predicate felony." *Id.* at 64. This Court rejected that argument.

The Court explained that the inconsistent verdicts "should not necessarily be interpreted as a windfall to the Government at the defendant's expense" because it is "equally possible" that the acquittal was the result of "mistake, compromise, or lenity." *Powell*, 469 U.S. at 65. When the jury returns an acquittal on one count that is inconsistent with a guilty verdict on another count, the Court observed, it is impossible to tell which verdict "the jury 'really meant.'" *Id.* at 68. "[A]ll we know is that the verdicts are inconsistent," and, "once that is established[,] principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Ibid.*

The same reasoning applies when a jury's acquittals on some counts are inconsistent with its failure to reach a verdict on other counts. In that situation as well, it is impossible to impute rationality to the jury. All a court can conclude is that the jury acted inconsistently and irrationally. Accordingly, the logical predicate for applying collateral estoppel is missing.

3. *Powell*'s conclusion that a rational jury decision is a necessary predicate for applying collateral estoppel follows from *Ashe*. In *Ashe*, the Court stated that, to determine whether collateral estoppel applies, a court must "examine the record of [the] prior proceeding," taking into account all "relevant matter," and "conclude whether a *rational* jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444 (citation omitted; emphasis added). Focusing the inquiry on what a rational jury could have done only makes sense if it is reasonable to presume that the jury in fact acted rationally.

A rule that collateral estoppel does not apply when the prior verdict reflects inconsistent determinations is also supported by this Court's decision in *Standefer* v. *United States*, 447 U.S. 10 (1980). In *Standefer*, the Court held that non-mutual collateral estoppel does not apply against the government in criminal cases. *Id.* at 21-25. In reaching that conclusion, the Court noted that the particular jury verdict for which the defendant was seeking preclusive effect included convictions on some counts that were inconsistent with acquittals on other counts. *Id.* at 23 n.17. The Court stated that "[t]his inconsistency [was] reason, in itself, for not giving preclusive effect to the acquittals." *Ibid.*

As *Standefer* makes clear, collateral estoppel "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct." 447 U.S. at 23 n.18; see Restatement (Second) of Judgments § 29 cmt. f (1982). "Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted." *Ibid.* (explaining rationale for rule that non-mutual collateral estoppel does not apply when the judgment that would be given preclusive effect is inconsistent with another prior judgment).

Indeed, in civil cases, courts may decline to apply collateral estoppel where it is "evident from the jury's verdict that the verdict was the result of compromise," rather than a rational decision that accords with the jury instructions and the law. Restatement (Second) of Judgments § 28 cmt. j (1982); see 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4420, at 523-525 (2d ed. 2002). When the record indicates that the same jury reached inconsistent determinations on an issue, a court cannot conclude that the issue "was 'necessarily

determined' against the Government, as is required to support a later holding of collateral estoppel." *Harary* v. *Blumenthal*, 555 F.2d 1113, 1116 (2d Cir. 1977). That reasoning precludes application of collateral estoppel under the Double Jeopardy Clause when a jury inconsistently acquits on some counts and hangs on others. Applying collateral estoppel in that circumstance would require the "oddly surrealistic and irrational" conclusion that "the jury necessarily decided that which it confessed it could not decide." *United States* v. *Romeo*, 114 F.3d 141, 145 (9th Cir. 1997) (O'Scannlain, J. dissenting).

4. Petitioner argues that the reasoning in *Powell* and *Standefer* does not foreclose application of collateral estoppel to bar a retrial here "because a mixed verdict of acquittals and hung counts does not create the same inconsistency as a mixed verdict of acquittals and convictions." Br. 26. But a verdict of acquittals and hung counts creates an equally powerful inference of irrationality if it is assumed that the jury's acquittals rejected a fact that the government also had to prove on the hung counts. And collateral estoppel applies only if that assumption is true.

This case illustrates the point. A rational jury would not have returned the mixed verdict if it found a fact in petitioner's favor that was essential to conviction on both the acquitted counts and the hung counts. Petitioner claims (Br. 45-51) that collateral estoppel bars a retrial on the insider trading and money laundering counts on which the jury hung because the government must prove that he possessed insider information to obtain a conviction on those counts and the jury, in acquitting him on the conspiracy and fraud counts, necessarily determined that he did not possess insider information. But, if the jury in fact acquitted on the conspiracy and

fraud counts because it determined that petitioner did not possess insider information, and that determination also requires acquittal on the insider trading and money laundering counts, then a rational jury should have acquitted on those counts as well. Because the jury did not acquit on those counts, if petitioner's theory of the verdict is correct, the jury must have acted inconsistently and irrationally. Thus, as in *Powell* and *Standefer*, principles of collateral estoppel are "no longer useful," and the acquittals cannot be given preclusive effect. *Powell*, 469 U.S. at 68; see *Standefer*, 447 U.S. at 23 n.17.

Petitioner and his amici (Pet. Br. 15, 34-44; NACDL Br. 10-11; Crim. Law Professors Br. 17-21) try to avoid that conclusion by arguing that courts have "attributed no meaning" to hung counts (Pet. Br. 38) so they should not be considered in the collateral estoppel analysis. That argument is mistaken. In asserting that a hung count is a meaningless "non-event" (NACDL Br. 10), petitioner and his amici rely on cases like *Richardson*. See Pet. Br. 42-43; NACDL Br. 10. But *Richardson* does not suggest that hung counts *never* have *any* significance. *Richardson* held that "the failure of the jury to reach a verdict is not an event which terminates jeopardy" and therefore "retrial following a 'hung jury' does not violate the Double Jeopardy Clause." 468 U.S. at 324-325. As discussed above, that holding supports retrial on the hung counts in this case.

The contention that hung counts should not be considered in collateral estoppel analysis is also at odds with *Ashe*. *Ashe* emphasized that, to determine whether a defendant's prosecution is barred by the collateral estoppel component of the Double Jeopardy Clause, a court must "examine the record of [the] prior proceed-

ing, taking into account the pleadings, evidence, charge and other relevant matter." 397 US. at 444 (citation omitted). The Court stressed that "[t]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Ibid.* (quoting *Sealfon*, 332 U.S. at 579). The jury's failure to reach a verdict on certain counts is certainly "relevant matter" in the record of the prior proceeding. Refusal to consider that information would flout this Court's plain command that the collateral estoppel inquiry consider "all the circumstances" of that proceeding.

Petitioner and his amici also err in arguing (Pet. Br. 26-27, 34; NACDL Br. 12-13.; Crim. Law Professors Br. 17-19) that, unless hung counts are ignored entirely in the collateral estoppel analysis, courts will be required to examine the hung counts in each case in an effort to determine why the jury failed to reach a verdict. The court of appeals did engage in that kind of analysis in this case. Pet. App. 24a-28a. But the court did so only because it rejected the government's argument that collateral estoppel *never* bars retrial on a hung count based on an acquittal by the same jury on another count. See *id.* at 25a.[7] If this Court accepts that argument (see pp. 23-33, *supra*), courts will not have to attempt to deter-

[7] Instead, the court concluded that, in each individual case, the hung counts must be considered along with the acquittals in an attempt to ascertain what facts, if any, the jury necessarily found in the defendant's favor. The government agrees with petitioner and his amici (Pet. Br. 44-45; NACDL Br. 3, 11; TCDL Br. 7) that the court of appeals' approach will in practice produce the same result as a categorical rule that collateral estoppel never applies. For that reason, and because the categorical approach is dictated by logic and precedent, this Court should not adopt the court of appeals' case-by-case approach.

mine the actual reasons why the jury hung in any particular case.

D. Petitioner's Policy Arguments Cannot Justify Extension Of Collateral Estoppel Principles To Bar Retrial Of Hung Counts

1. Petitioner argues (Br. 16-23) that allowing retrial on the hung counts would unfairly subject him to the costs and anxiety of a second trial and permit the government to hone its case after it failed to obtain a conviction on those counts in the first trial. That argument ignores this Court's repeated holdings that the prohibition on double jeopardy "does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade*, 336 U.S. at 688. On the contrary, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 689.

A hung jury has long been considered "the classic basis for a proper mistrial" that "require[s] the defendant to submit to a second trial." *Washington*, 434 U.S. at 509. Whenever a defendant faces a retrial after a hung jury, he must endure the costs and anxiety of a second trial and the risk that the government may learn from mistakes it made in the first trial. But that is an unavoidable cost of honoring "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Ibid.* This is not a case like *Ashe* in which the government held back related counts so that it could try them later if the first trial ended in an acquittal. Instead, it is a case in which the government seeks one full and fair opportunity to

convict on charges that it brought in a single prosecution.[8]

2. Petitioner and his amici also contend (Pet. Br. 16, 23-27; NACDL Br. 9-14; Crim. Law Professors Br. 21-25) that allowing retrial on the hung counts in this case would undermine "the traditional deference accorded jury acquittals." Pet. Br. 16. That contention is incorrect.

Allowing retrial on hung counts when the jury simultaneously acquits on other counts would not infringe the longstanding principle that a verdict of acquittal provides "absolute immunity from further prosecution for the same offense," *Nelson*, 488 U.S. at 39, and "may not be appealed," *Scott*, 437 U.S. at 91. The government thus cannot retry the acquitted conspiracy and fraud counts, even if it could proceed on a different legal theory or new factual proof.

Allowing retrial on the hung counts in the circumstances here also would not inappropriately curtail the collateral estoppel effect of acquittals. Collateral estoppel would continue to apply if the government sought to bring seriatim prosecutions and an acquittal in the initial prosecution necessarily determined an issue of fact in the defendant's favor that the government must prove to obtain a conviction in the subsequent prosecution.

[8] Petitioner contends (Br. 22) that the government improperly "tailor[ed]" the charges in the eighth superseding indictment "to avoid making the same mistakes with a second jury" that it purportedly made in the first trial. The eighth superseding indictment, however, merely omitted certain factual allegations from the prior indictment to reflect the jury's acquittals on the conspiracy, securities fraud, and wire fraud counts and reduced the number of insider trading and money laundering counts. The government's decision to omit extraneous allegations and to abandon certain counts that it could have legally retried does not offend double jeopardy principles.

Even an acquittal that was accompanied by hung counts could have collateral estoppel effect in a successive prosecution involving new counts that were not brought in the initial prosecution. For example, if the jury, in acquitting petitioner on the wire fraud charges at his first trial, necessarily found that he did not participate in preparing the press releases issued by Enron or EBS, those acquittals would collaterally estop the government from bringing a new prosecution charging petitioner with mail fraud based on those press releases.

3. Petitioner and his amici also argue (Pet. Br. 27-33; NACDL Br. 14-21; Crim. Law Professors Br. 28-30) that allowing retrial on hung counts in these circumstances will encourage prosecutorial overcharging. They assert that prosecutors will take advantage of the numerous overlapping offenses in modern criminal codes "to charge as many overlapping counts as possible, thereby paving the way for a retrial[,]" in order to "evad[e] the collateral estoppel consequences of * * * an acquittal." NACDL Br. 14.

Those contentions ignore the substantial risks faced by a prosecutor who "charge[s] as many overlapping counts as possible." A prosecutor who loads down his case with unnecessary charges makes the case more difficult for the jury to comprehend and increases the likelihood that the jury will acquit the defendant "through mistake, compromise, or lenity." *Powell*, 469 U.S. at 65. Indeed, prosecutorial overcharging tempts the jury to use its unreviewable power to acquit "as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Ibid.*; see *Standefer*, 447 U.S. at 22. Prosecutors are unlikely to add charges that may increase the likelihood of acquittals on some counts

in order to "evad[e] the collateral estoppel consequences of * * * an acquittal" on those counts.

Petitioner and his amici also ignore the substantial risks to the government that overcharging could produce jury confusion and a mistrial on all counts. As this Court has noted, "[i]t is possible that new evidence or advance understanding of the defendant's trial strategy will make the State's case even stronger during a second trial," but "[i]t is also possible * * * that the passage of time and the experience of defense counsel will weaken the prosecutor's presentation." *Tibbs*, 457 U.S. at 43 n.19; see *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986) ("The passage of time may make it difficult or impossible for the Government to carry [its] burden [of proving its case beyond a reasonable doubt]."); *Engle* v. *Isaac*, 456 U.S. 107, 127-128 (1982) ("Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible.").

In part because of these practical concerns, federal prosecutors are instructed to "bring as few charges as are necessary to ensure that justice is done." *United States Attorneys' Manual* § 9-27.320(B) (Jan. 2007). Those instructions reflect the government's recognition that overcharging undermines "the fair and efficient administration of justice." *Ibid.* Given the obvious costs to the government of bringing unnecessary charges, and the clear guidance discouraging that conduct, allowing retrials on hung counts in the mixed verdict context is unlikely to result in the strategic overcharging suggested by petitioner and his amici.

Petitioner (Br. 28) and amicus NACDL (Br. 17 n.2) contend that the government overcharged the offenses against petitioner, but that claim is misguided. The fifth superseding indictment broke down the counts into four

logically distinct units. The indictment charged (1) one count of conspiracy based on securities and wire fraud; (2) one count of substantive securities fraud based on the false statements in the analyst conference; (3) three counts of wire fraud based on false press releases; and (4) remaining counts growing out of petitioner's alleged insider trading, in which he used undisclosed material information to sell Enron stock, and his alleged money laundering by investing the proceeds in other financial holdings. See Pet. App. 30a-31a. The number of the insider trading and money laundering counts was large only because the number of allegedly fraudulent and money laundering transactions in which petitioner engaged was vast. But the conduct underlying the insider trading and money laundering counts all turned on a common core of factual proof: that petitioner used his knowledge of the problems with EBS when he sold Enron stock without disclosing his knowledge to investors. See *id.* at 50a n.28. No dispute existed that petitioner engaged in the charged transactions; rather, the central issue for the jury was whether petitioner used nonpublic material information in trading. The number of counts did not affect the jury's ability to decide that issue; indeed, the jury hung on all of insider trading and money laundering counts, suggesting that it viewed them of a piece. Accordingly, petitioner's speculation (Br. 28) that the jury returned a mixed verdict of acquittals and hung counts because of exhaustion or confusion in wading through numerous counts lacks foundation. The far more likely explanation is that it could not agree whether he acted in good-faith, Pet. App. 55a-56a (describing petitioner's "good faith" defense), or whether he used insider information in making his trades, *id.* at 56a (describing petitioner's "defense that he did not '*use*'

material, nonpublic information, based on testimony that the trades were made by [petitioner] or his wife, in the course of normal investing and for purposes of diversification").

Not only is the purported policy justification for expanding collateral estoppel (*viz.*, to deter overcharging) a questionable basis for expanding one double jeopardy doctrine at the expense of other settled double jeopardy doctrines, but the expansion is at odds with other important double jeopardy policies. The government's right to one complete opportunity to secure a conviction for a violation of the laws, which is the foundation for the rule permitting the retrial of hung counts, does not exist for its own sake. Rather, that right serves the public's profound interest in ensuring that criminal violations are adjudicated in court. When a grand jury has found probable cause to believe that the criminal laws were violated, the public is entitled to seek a jury verdict that resolves that matter. Concern about prosecutorial overcharging, which is likely to be a self-defeating practice in any event, should not thwart that important public interest.

E. Petitioner Has Not Established That The Jury's Acquittals Necessarily Determined A Fact In His Favor That The Government Must Prove To Convict Him On The Hung Counts

Even if the Court agrees with petitioner that acquittals can preclude retrials on counts on which the same jury hangs (and that hung counts cannot be considered at all in the collateral estoppel analysis), the Court should affirm the judgment of the court of appeals. Petitioner has not carried his burden of showing that the jury, in acquitting him on the conspiracy and securities

and wire fraud charges, necessarily found a fact in his favor that the government must prove to convict him on the insider trading and money laundering charges on which it seeks to retry him.

Petitioner contends (Br. 45-51) that a retrial is barred because the acquittals, viewed in isolation, necessarily determined that he did not possess insider information—an element that the government must prove beyond a reasonable doubt to convict him on the insider trading and money laundering charges. Petitioner primarily relies (Br. 45-46) on the court of appeals' conclusion that, if the acquittal on the securities fraud count is considered without giving any weight to the hung counts, "the jury must have found that * * * [petitioner] himself did not have any insider information." Pet. App. 21a. The court of appeals' conclusion on that point is, however, incorrect.[9] Rather, the district court's contrary conclusion, based on its far greater familiarity with the nature of the charges, the evidence at trial, and the parties' positions, shows why petitioner did not carry his burden in this case.

The court of appeals reached its conclusion based on two subsidiary determinations, both of which rested on the same flawed premise—that petitioner did not dispute that he shaped the message at the 2000 analyst conference. First, the court determined that "the jury

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[9] Indeed, later in its opinion, the court appeared to retreat from that conclusion. When considering possible explanations for the apparent inconsistency between the acquittal on the securities fraud count and the failure to reach a verdict on the insider trading and money laundering counts, the court observed that it was possible "that the jury decided that [petitioner] had insider information when considering both sets of counts, but, for some unknown reason, it nonetheless acquitted [him] on some of them." Pet. App. 24a.

could not have acquitted [petitioner] by finding that, while there were representations or omissions made, [petitioner] did not participate in making them." Pet. App. 19a-20a. The court rested that determination on its belief that petitioner "did not dispute" the government's argument "at trial that [petitioner] helped shape the message of the conference presentations." *Id.* at 20a. Second, the court determined that "the jury could not have acquitted [petitioner] for negligently making material misrepresentations or omissions." *Ibid.* That determination also rested on the court's mistaken belief that "it was undisputed that [petitioner], as Senior Vice President of Strategic Development, helped plan the conference message." *Ibid.*

In fact, as the district court found, petitioner hotly disputed that he had any involvement in shaping the conference presentations. Pet. App. 55a-57a; see p. 6, *supra*; see, *e.g.*, Tr. 9938-9941 (petitioner denying any role in deciding which slides were shown at the conference); Tr. 9941-9947 (petitioner denying any role in preparing the presentation on the network control software layer); Tr. 9953 (petitioner denying attendance at the "run-through" the day before the conference); Tr. 9932-9933 (petitioner testifying that the videos for which he was responsible were not shown at the conference).[10]

As the district court observed, "the defense * * * argued that [petitioner] did not participate in the craft-

[10] Petitioner also vigorously denied that he had any participation in the press releases that formed the basis for the wire fraud counts. Pet. App. 55a; see, *e.g.*, Tr. 9911, 9913, 13,384. And the district court found that "the government introduced no evidence that [petitioner] played any role in the formation of the press releases." Pet. App. 55a. As for the conspiracy charge, petitioner denied that he entered into any agreement with anyone to commit a crime. *Ibid.*; see, *e.g.*, Tr. 9920.

ing of the statements in the press releases; did not participate in the creation of the slides or statements presented at the analysts conference; and did not reach an agreement with any other person to make false, misleading, or deceptive statements or material omissions of fact." Pet. App. 55a. Thus, as the district court concluded, the jury may well have acquitted petitioner on the conspiracy, securities, and wire fraud charges based on a finding that petitioner had no role in making false statements or material omissions at the analyst conference or in the press releases and that he had not conspired with anyone to commit fraud. *Id.* at 59a. In light of that possible explanation for the acquittals, petitioner cannot carry his burden of showing that the jury *necessarily* determined that he did not possess insider information based on acceptance of his "good faith" defense. See *Dowling*, 493 U.S. at 352 (declining to apply collateral estoppel because "[t]here [were] any number of possible explanations for the jury's acquittal verdict").[11]

Contrary to petitioner's contentions (Br. 46, 48-49), the jury was not instructed that it could find him guilty on the conspiracy and fraud counts based solely on a finding that he "knew the 'truth' about EBS and failed to disclose it" when others made misstatements at the

[11] Petitioner incorrectly suggests (Br. 45-46) that the district court concluded that the jury must have accepted his "good faith" defense. On the contrary, the district court ruled that the jury's acquittals were more likely based on a finding that petitioner did not knowingly and willfully *participate* in the scheme to defraud. Pet. App. 57a-59a. The district court concluded that the jury most likely did *not* accept petitioner's "good faith" defense. *Id.* at 58a-59a. Although the court considered the hung counts in reaching that conclusion, *id.* at 59a, the record clearly supports the possibility that the acquittals, even when viewed in isolation, may have been based on a finding that petitioner did not participate in the scheme to defraud.

analyst conference and in the press releases. Br. 48. The jury was instructed that, to find petitioner guilty on the conspiracy count, it had to find that he "made an agreement to commit the crime of wire fraud or securities fraud" with at least one other person. J.A. 90. The jury was specifically told that it had to acquit petitioner if he "was not a member of the conspiracy." J.A. 92. On the securities fraud count, the jury was instructed that it could find petitioner guilty only if he "participated in the scheme or fraudulent conduct" or personally "caused" material misstatements to be made or material facts to be omitted from statements that were made. J.A. 95. The jury was expressly told that it had to acquit petitioner if he "was not a knowing participant in the scheme." J.A. 111. And, on the wire fraud charges, the jury was instructed that it could find petitioner guilty only if he "knowingly devised or intended to devise a scheme to defraud" and he "either wired" the allegedly false press releases or "caused [them] to be wired in interstate commerce in an attempt to execute or carry out the scheme." J.A. 118. Thus, the jury was not required to find petitioner guilty on the conspiracy and fraud charges simply because it found that he possessed insider information and failed to disclose it. The acquittals on those counts therefore do not indicate that the jury necessarily determined that petitioner did not possess and fail to disclose insider information. See Pet. App. 58a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
RITA M. GLAVIN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
JOSEPH C. WYDERKO
Attorney

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